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20 **UNITED STATES DISTRICT COURT**  
21 **NORTHERN DISTRICT OF CALIFORNIA**  
22

23 OWEN DIAZ,  
24 Plaintiff,  
25 v.  
26 TESLA, INC. DBA TESLA MOTORS, INC.,  
27 Defendant.  
28

Case No. 3:17-cv-06748-WHO

**PLAINTIFF'S BRIEF IN OPPOSITION  
TO TESLA, INC.'S MOTIONS IN  
LIMINE NOS. 1-4**

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1       **I. Opposition to Tesla's Motion in Limine No. 1 to Permit Testimony from**  
 2       **Witnesses Robert Hurtado and Andres Donet**

3           This Court has already ruled that “new witnesses will be prohibited” at the retrial on  
 4       damages. Dkt. 376. Tesla’s motion, seeking an exception to the Court’s ruling so it may call new  
 5       witnesses Robert Hurtado and Andres Donet to testify at the retrial, provides no persuasive  
 6       reason for the Court to reconsider its practical prior ruling, which was consistent with governing  
 7       law and is equally fair to both parties.

8           District courts “have the discretion to admit or exclude new evidence or witnesses on  
 9       retrial.” *Little v. City of Richmond*, No. 13-CV-02067-JSC, 2015 WL 798544, at \*1 (N.D. Cal.  
 10      Feb. 23, 2015). In exercising that discretion, courts require a party seeking to admit new  
 11      evidence on retrial to demonstrate that the exclusion of that new evidence would result in  
 12      “manifest injustice.” *Id.* at \*2; *see also Galdamez v. Potter*, 415 F.3d 1015, 1020 (9th Cir. 2005);  
 13      Fed. R. Civ. P. 16(e). Further, “if the moving party knew or should have known that certain  
 14      witnesses or evidence was necessary at the time of the first trial, then the exclusion of those  
 15      witnesses during the retrial will likely not be manifestly unjust.” *Little*, 2015 WL 798544, at \*2  
 16      (citing *Martin’s Herend Imports, Inc. v. Diamond & Gem Trading U.S. Co.*, 195 F.3d 765, 775  
 17      n.15 (5th Cir. 1999)); *accord Hooper v. Cnty. of San Diego*, 2020 WL 6565847, at \*2 (S.D. Cal.  
 18      Nov. 9, 2020). That is this case.

19           1. Robert Hurtado should be excluded.

20           Robert Hurtado did not testify at the first trial, was not deposed, was not listed by Tesla  
 21       as a trial witness, and was not identified by Tesla in its discovery responses. Seeking to undo its  
 22       prior counsel’s strategic choices, Tesla now seeks to call Mr. Hurtado as a witness at the  
 23       upcoming retrial. But Tesla “knew or should have known that [Mr. Hurtado] was necessary at  
 24       the time of the first trial” and thus cannot show manifest injustice. *Little*, 2015 WL 798544, at  
 25      \*2. Tesla’s request to call Mr. Hurtado is especially improper given that Tesla refused to provide  
 26       information regarding Mr. Hurtado, including his contact information, throughout discovery..

27           Tesla’s motion is based on its assertion that it “could not have anticipated a need to call  
 28       Mr. Hurtado [at the first trial] to rebut accusations that Tesla created a hostile work environment”  
 because Mr. Diaz never put Tesla on notice of Mr. Hurtado’s importance to Mr. Diaz’s case.

Mot. at 4. The record proves otherwise. We begin with Mr. Diaz's complaint, filed in October 2017, which alleged that "Conveyance Supervisor Robert (last name unknown)" gave Mr. Diaz instructions by saying "[N-word], hurry up, press the button," and that "Robert regularly referred to Owen as '[N-word]' and also frequently called him 'boy' in a demeaning tone." Dkt. 1-2 ¶¶ 36-37; Dkt. 57 ¶¶41-42 (amended complaint). These allegations were also explored extensively at Mr. Diaz's three-day deposition, in which Mr. Diaz's harasser "Robert" was mentioned by name 92 times—65 times of which were by Tesla's counsel.<sup>1</sup>

Tesla's assertion that Mr. Diaz "denied knowing or recalling specific information about his interactions with [Mr. Hurtado]" at his deposition is also false: at his deposition, Mr. Diaz stated that Mr. Hurtado called him the N-word at least 30 times and recounted the content and circumstances of several explicit racist remarks Mr. Hurtado had made to him. Nunley Decl., Ex. A (Owen Diaz Depo.) at 55:18–56:08, 58:01–58:17, 234:03-25.<sup>2</sup> Tesla's knowledge of Mr. Hurtado's importance is further demonstrated by its strategic decision to call Joyce DelaGrande

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<sup>1</sup> Tesla does not contend it didn't know which "Robert" Mr. Diaz was referring to, and the record is clear that Tesla (unlike Mr. Diaz) was well aware that the harasser Mr. Diaz knew as "Robert" was Tesla supervisor/lead Robert Hurtado. While Mr. Diaz stated at his deposition that he did not know Robert's last name, he provided plenty of information from which Tesla could identify him, including Robert's position, department, race, and the timeframe in which he harassed Mr. Diaz. Nunley Decl., Ex. A (Owen Diaz Depo.) at 56:21–56:22, 308:09–308:18. It seems clear that Tesla knew which Robert it was even prior to the deposition, because its attorneys asked Mr. Diaz on multiple occasions during that deposition if his harasser was Robert Hurtado, and they even asked Mr. Diaz to look at emails from Joyce DelaGrande discussing Mr. Diaz's request that Mr. Hurtado only talk to him about business. *Id.* at 169:18–170:18. If Tesla had any doubt about Robert's identity, it could have asked Mr. Diaz to identify him using photographs, *the same way Tesla asked Demetric Di-az to identify his harassers at deposition*. See Nunley Decl., Ex. B (Demetric Di-az Depo.) at 171:12–175:01.

<sup>2</sup> Tesla also defends its decision not to identify Mr. Hurtado as a witness at trial by asserting a purported inconsistency between Mr. Diaz's deposition and trial testimony regarding whether he complained to Ms. DelaGrande about Mr. Hurtado. Mot. at 4. This makes no sense. The significance of harassment by a supervisor like Mr. Hurtado does not turn on whether the harassment was reported to another supervisor. Moreover, Tesla knew before trial that Diaz *did* complain to Ms. Delagrande, because Ms. DelaGrande (Tesla's own witness) testified about those complaints, and her emails confirmed it. See Nunley Decl. Ex. J (Trial Tr. Vol. 5) 5:742:21-25 ("Q. Okay. [Diaz] told you that your associates had threatened him; right? A. Yes. Q. And didn't you have to investigate that? A. Yes."); Nunley Decl., Ex. L (Trial Ex. 298) ("Owen is now here telling me that my associate threatened him[.]").

1 as the trial witness who could counter Mr. Diaz’s allegations by testifying that she worked  
 2 “constantly” with Mr. Hurtado, that she never heard complaints of him using the N-word or other  
 3 slurs, and that he “would never say something like that.” Nunley Decl. Ex. J (Trial Tr. Vol. 5)  
 4 5:735:1-15.

5 Mr. Hurtado should thus be excluded from the retrial based on the principle expressed by  
 6 Tesla’s own cited case and many others, that Tesla “knew or should have known that [the  
 7 witness] was necessary at the time of the first trial.” *Fresno Rock Taco, LLC v. Nat’l Sur. Corp.*,  
 8 No. 1:11-CV-00845-SKO, 2013 WL 3803911, at \*2 (E.D. Cal. July 19, 2013); *Little*, 2015 WL  
 9 798544, at \*2; *Hooper*, 2020 WL 6565847, at \*2; *Martin’s Herend Imports, Inc.*, 195 F.3d at  
 10 775 n.15. Tesla’s former counsel made a strategic *choice* not to call Mr. Hurtado—who was and  
 11 is a Tesla employee—and it must bear the consequences of that choice.

12 Tesla’s request to call Mr. Hurtado should also be denied under Rule 37 and this Court’s  
 13 prior discovery orders, because Tesla *refused*, throughout the entire pre-trial stage of this case, to  
 14 identify Mr. Hurtado or provide contact information for him.

15 Tesla failed to identify Mr. Hurtado in its initial disclosures, never supplemented its  
 16 disclosures to identify Mr. Hurtado, and never included Mr. Hurtado on its pretrial witness list.  
 17 As a result, Mr. Hurtado has never been deposed. Most egregiously, and contrary to Tesla’s  
 18 claims of good faith, *see* Mot. at 4, Plaintiff’s interrogatories specifically requested the names  
 19 and most recent contact information for all Tesla employees with whom Mr. Diaz had worked,  
 20 and Tesla never provided Robert Hurtado’s name or contact information, notwithstanding its  
 21 clear knowledge that Mr. Diaz worked with Mr. Hurtado, *see supra* n.1, *even after this Court*  
 22 *specifically ordered Tesla to provide contact information for all Tesla employees whom Tesla*  
 23 *was aware worked with Mr. Diaz, see* Dkt. 93 at 2. When Plaintiff subsequently sought sanctions  
 24 against Tesla for this misconduct, Tesla took the position (completely contrary to its current  
 25 position) that Mr. Hurtado was *not* a person who worked “with or around” Mr. Diaz, and that  
 26 Mr. Hurtado “may or may not be the same ‘Robert’ Plaintiff testifies about.” Dkt. 156 at 13. The  
 27 Court denied sanctions but ruled that “[i]f the plaintiffs are able to show that Tesla has concealed  
 28 identifying information or failed to disclose anyone who was in fact responsive to plaintiffs’  
*discovery requests and my order, Tesla will not be permitted to call those individuals as*

1       **witnesses during trial.** That will become apparent once the parties have exchanged their witness  
 2 lists prior to the pretrial conference[.]” Dkt. 160 (emphasis added). Therefore, under the federal  
 3 rules and under the Court’s sanctions order, Tesla has long since waived any right to call Mr.  
 4 Hurtado to testify at trial. *See id.*; Fed. R. Civ. P. 37 (“If a party fails to provide information or  
 5 identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that  
 6 information or witness to supply evidence … at a trial, unless the failure was substantially  
 7 justified or is harmless.”).

8       Tesla’s arguments for allowing Mr. Hurtado to testify are wholly unpersuasive. Tesla  
 9 contends that calling Mr. Hurtado at retrial would cause no prejudice to Mr. Diaz, but that is  
 10 plainly untrue. This situation falls within the core area of prejudice that Rules 16 and 37 are  
 11 designed to prevent—one party concealing or preventing access to a material witness throughout  
 12 discovery and up to trial, then later attempting to use that witness for its own strategic purposes  
 13 and without the opportunity for timely discovery.<sup>3</sup> This prejudice is amplified in the context of a  
 14 retrial to assess damages from misconduct—including by Robert Hurtado—that the liability jury  
 15 already found. Tesla’s theory is that even a last-minute, previously disclaimed witness causes no  
 16 prejudice to the other party so long as that witness was already known to be important. But if that  
 17 were correct, then calling belated witnesses on retrial (or at any trial) would be the norm rather  
 18 than a rarity reserved only for circumstances of “manifest injustice.”

19       Tesla is also wrong to suggest that “[a]llowing Mr. Hurtado to testify will not affect the  
 20 conduct of the trial.” Mot. at 4. If Mr. Hurtado testifies consistently with his declaration, it will  
 21 likely force the parties to spend significant time litigating *Mr. Hurtado’s* credibility, an issue far  
 22 removed from the core disputes of the retrial.<sup>4</sup> Plaintiff knows of at least one third-party witness

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23       <sup>3</sup> Tesla’s suggestion that it will now, at long last, make Mr. Hurtado available for a  
 24 deposition falls far short of curing this prejudice. Among other problems, the reason Tesla was  
 25 supposed to identify Mr. Hurtado during the normal discovery period was not only to permit a  
 26 deposition, but also to allow Plaintiff to test Mr. Hurtado’s testimony with written discovery, to  
 27 conduct an independent investigation of his claims, and to identify potential rebuttal witnesses—  
 an impossible task on the tight timeframe of the upcoming retrial.

28       <sup>4</sup> Based on his new declaration, moreover, Mr. Hurtado’s testimony would be more likely  
 to mislead rather than inform the jury. For instance, Mr. Hurtado lacks foundation for his  
 contemplated testimony about whether Mr. Diaz complained to Ms. DelaGrande, *see* Hurtado

1 identified but not called at the first trial who would impeach Mr. Hurtado and demonstrate Mr.  
 2 Diaz's credibility to rebut Mr. Hurtado's proposed new testimony: Lamar Patterson.<sup>5</sup> Mr.  
 3 Patterson testified in his deposition that he witnessed an incident in the elevator in which Mr.  
 4 Hurtado was angry with Mr. Diaz and used the N-word. *See* Nunley Decl., Ex. C (Patterson  
 5 Depo.) at 75:24–77:04. There are undoubtedly other such witnesses as well, who were not  
 6 identified but whom Plaintiff should be entitled to call as impeachment witnesses if Mr. Hurtado  
 7 is permitted to testify on retrial despite his previous exclusion. Especially given the retrial's  
 8 focus on compensatory and punitive damages rather than liability, the far simpler, fairer, and  
 9 more efficient course is not to create a "Hurtado exception" to the Court's order prohibiting  
 10 previously undisclosed witnesses on retrial.<sup>6</sup>

11 Tesla also argues that even if it cannot call Mr. Hurtado as a substantive witness, it  
 12 should be permitted to call him for "impeachment" purposes because impeachment witnesses  
 13 need not be disclosed prior to trial. Mot. at 2. Tesla's argument is incorrect, as its own cited cases  
 14 show. While it is generally true that witnesses whose testimony would be used solely for  
 15 impeachment need not be disclosed, that rule "does not apply to testimony which also has  
 16 substantive value." *Mort v. DeJoy*, 2022 WL 14129778, at \*1 (E.D. Cal. Oct. 24, 2022) (cited at  
 17 Mot. at 2); *accord Fresno Rock Taco*, 2013 WL 3803911, at \*5 (cited at Mot. at 2). As many  
 18 courts have explained, "[c]ase law holds that evidence material to the substance of the case—  
 19 evidence that would tend to prove the truth of a matter to be determined by the jury—must be  
 20 disclosed even if it could also be considered impeaching with respect to some aspect of a

21  
 22  
 23 Decl. ¶ 9, and contrary to Mr. Hurtado's sworn declaration (at ¶ 16), there was no testimony at  
 24 the first trial accusing him of making racist comments in Spanish to anyone. Most significantly,  
 25 contrary to Mr. Hurtado's outright denial that he ever harassed Mr. Diaz, Mr. Diaz credibly  
 identified Mr. Hurtado by photograph at trial. Nunley Decl. Ex. H (Trial Tr. Vol. 3) 3:412:25–  
 413:5.

26       <sup>5</sup> Mr. Patterson was included on Plaintiff's witness list for the first trial, but Plaintiff  
 27 ultimately did not need to call him.

28       <sup>6</sup> Tesla's suggestion that allowing Mr. Hurtado to testify will "help ensure that the new  
 [damages] award is not again inflated," Mot. at 4, is both improper and ill-reasoned. Nothing in  
 the Court's remittitur order remotely suggested that the first jury's damages verdict was too large  
 because the jury failed to consider Mr. Hurtado's (or Tesla's) point of view.

witness's testimony." *Lil' Man In The Boat, Inc. v. City & Cnty. of San Francisco*, 2019 WL 8263440, at \*4 (N.D. Cal. Nov. 26, 2019); *see Norwood v. Child. & Youth Servs. Inc.*, 2013 WL 12133879, at \*4 (C.D. Cal. Dec. 3, 2013), at \*4-5 (explaining rule and collecting cases). Here, Tesla's proposed "impeachment" use of Mr. Hurtado's testimony is identical to its proposed substantive use of that testimony—in Tesla's words, it "would impeach Mr. Diaz's anticipated testimony that Mr. Hurtado supposedly directed racially derogatory words at Mr. Diaz and that Mr. Diaz supposedly complained regarding Mr. Hurtado's alleged harassment to Tesla supervisors who failed to respond." Mot. at 2. This "impeachment" testimony would go to the heart of what appears to be Tesla's planned substantive defense at retrial—that contrary to the first jury's verdict, most or all of the harassment of Mr. Diaz in fact never took place, and therefore damages should be nominal. Consequently, Mr. Hurtado's testimony must be excluded. *See Norwood*, 2013 WL 12133879 (excluding undisclosed witness who similarly would have "impeach[ed] by contradiction").<sup>7</sup>

In the alternative, Tesla suggests that if it is not permitted to call Mr. Hurtado, it should be entitled to a "curative" instruction. *See* Mot. at 5. There is no basis for such an instruction, and Tesla's proposed instruction is entirely improper. Tesla's proposal to instruct the jury that Mr. Hurtado "could not testify at this trial"—as if he were prevented by illness rather than Tesla's prior litigation strategy and the resulting court ruling—coupled with its prejudicially slanted characterization of his use of the N-word more than 30 times as nothing more than "racially

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<sup>7</sup> Tesla's argument that Mr. Hurtado should be admitted as an "impeachment" witness also fails for multiple other reasons. *First*, as Tesla's cited cases also explain, undisclosed witnesses cannot testify even for impeachment purposes if the offering party failed to disclose the relevant evidence in discovery, as Tesla did here, *see supra* at 3-4. *See Mort*, 2022 WL 14129778, at \*1 ("[I]f evidence that has impeachment value is subject to mandatory disclosure or was requested in discovery, a litigant who fails to reveal such evidence faces having it excluded at trial, or other ramifications.") (citation omitted). *Second*, if Mr. Hurtado is truly an impeachment witness, Tesla provides no explanation why it did not call him to impeach Mr. Diaz at the first trial—certainly, Tesla had ample time remaining to do so. *Third*, the reasons for excluding new witnesses at retrial—impeachment or otherwise—go beyond the principle of timely disclosure under Rule 26, but also include the need for a practical retrial and consistency between the two verdicts. *Fourth*, Tesla's reasoning, if accepted, would blow open the evidentiary doors of the retrial. For example, if Joyce DelaGrande repeats her testimony that she never heard the N-word at Tesla, Plaintiff would be entitled to impeach her by calling numerous other undisclosed Tesla employees who would testify to the word's pervasive use there.

1 insensitive statements” and its reference to “the credibility or truthfulness of Mr. Diaz’s  
 2 accusations about Mr. Hurtado,” obviously invite the jury to draw the conclusion that Tesla was  
 3 not at all responsible for Mr. Hurtado’s failure to testify, that the testimony concerning Mr.  
 4 Hurtado’s repeatedly racists epithets was only minimally significant, and that if Mr. Hurtado had  
 5 been able to testify, he would have successfully impeached Mr. Diaz’s credibility in some  
 6 unexplained way. Tesla’s misleading proposed instruction lacks any basis in law or fact and  
 7 should be rejected in its entirety. *See Jones v. Williams*, 297 F.3d 930, 934 (9th Cir. 2002)  
 8 (parties are entitled to jury only instructions only where the instruction is “supported by law and  
 9 has foundation in the evidence”). Moreover, Tesla’s proposed instruction is merely a biased and  
 10 overly specific version of the existing credibility instruction. *See Jury Ins. No. 8* (“The weight of  
 11 the evidence as to a fact does not necessarily depend on the number of witnesses who testify.  
 12 What is important is how believable the witnesses were, and how much weight you think their  
 13 testimony deserves.”); *Brewer v. City of Napa*, 210 F.3d 1093, 1097 (9th Cir. 2000) (instruction  
 14 need not be given when existing instructions “fairly and adequately cover[] the issues  
 15 presented”).

16 Tesla also requests that Plaintiff be prohibited, in closing argument, from “inviting the  
 17 jury to draw any negative inference based on Mr. Hurtado’s nonappearance at the retrial.” Mot.  
 18 At 5. This proposal, too, is improper and unfair. Plaintiff can properly point to Mr. Hurtado’s  
 19 absence at the retrial for the exact same reason he could do so at the first trial—Tesla made the  
 20 affirmative strategy choice not to call Mr. Hurtado to testify and sought to hide his identity and  
 21 prevent a deposition of him for the entirety of the litigation until now. The mere fact that Tesla  
 22 has sought to improperly enlarge the scope of the damages retrial—notwithstanding its prior  
 23 stated concerns about ensuring consistency between liability and damages under *Gasoline*  
 24 *Products*—is not a proper basis for precluding Mr. Diaz from repeating his prior arguments (to  
 25 which no objections were asserted). The unfairness of Tesla’s proposed request is exacerbated by  
 26 the fact that Tesla is seeking to have it both ways. At the first trial, *Tesla* urged the jury to draw  
 27 an adverse inference based on the fact that Plaintiff did not call Lamar Patterson to testify. *See*  
 28 6:931:11-17. Plaintiff did not file a motion *in limine* to allow Mr. Patterson to testify (as Tesla  
 has done regarding Mr. Hurtado and Mr. Donet) because the Court expressly ruled that “new

1 witnesses are prohibited.” Dkt. 376. It would be grossly unfair to permit Tesla to repeat its empty  
 2 chair argument while precluding Plaintiff from accurately stating the facts concerning witnesses  
 3 Tesla could have called had it complied with the discovery rules and the Court’s orders.<sup>8</sup>

4       2. Andres Donet should be excluded.

5           Andres Donet, a “janitorial employee manager” at Tesla, was on Tesla’s witness list for  
 6 the first trial, but Tesla deliberately chose not to call him. As with Mr. Hurtado, Tesla’s strategic  
 7 decision not to call Mr. Donet at the first trial precludes Tesla from having him testify at the  
 8 retrial, just as Plaintiff is precluded from calling witnesses at retrial who were on his witness list  
 9 but did not testify at the first trial.

10          Tesla fails to carry its burden of demonstrating that it would suffer manifest injustice if  
 11 the Court adheres to its prior ruling precluding both sides from calling witnesses they chose not  
 12 to have testify at the first trial. *Little*, 2015 WL 798544, at \*1. The only “manifest injustice”  
 13 Tesla identifies is “the risk that, absent his testimony, the jury will improperly award damages  
 14 against Tesla for failing to remove racist graffiti in the bathrooms when that is not true.” Mot. at  
 15 6. That rationale for carving out a special exception for Mr. Donet plainly fails: if the jury’s  
 16 inability to hear a new witness testify about topics he could have testified about before qualified  
 17 as “manifest injustice,” the testimony of new and undisclosed witnesses would *always* be  
 18 permitted.

19          Tesla does not identify *any* change in circumstances or any other reason why it should be  
 20 relieved from its prior strategic decision not to call Mr. Donet, other than the fact it now has new  
 21 counsel. The substance of Mr. Donet’s proposed testimony was well known to Tesla before the  
 22 first trial. If Tesla were right that “Mr. Donet’s brief testimony is necessary for the jury to make a  
 23 fully informed decision in this case,” Mot. at 7, it should have called him during the first trial, yet  
 24 it elected not to use him as a witness despite having ample time to do so.

25          Tesla’s assertion that Plaintiff would suffer no prejudice from calling Mr. Donet is

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27       8 For this reason, if the Court precludes Mr. Diaz from pointing out Mr. Hurtado’s  
 28 absence to the jury, it should similarly preclude Tesla from making that same argument with  
 respect to Mr. Patterson, since the Court’s prior order, evenhandedly applied, also prohibited Mr.  
 Diaz from calling Mr. Patterson to testify at the retrial.

1 wrong: certainly Plaintiff would be prejudiced by allowing Tesla, but not Plaintiff, to introduce  
 2 new witnesses at retrial. Moreover, Mr. Donet's testimony is highly unlikely to meaningfully  
 3 assist the jury in making its determination of compensatory and punitive damages, since he lacks  
 4 foundation for the testimony Tesla seeks to elicit.

5 Tesla states that Mr. Donet will testify that "he did not see the graffiti Mr. Diaz described  
 6 and that he cleaned up any graffiti he learned about." Mot. at 6. But when Plaintiff explored  
 7 these topics with Mr. Donet in the brief 45-minute deposition the Court allowed, Mr. Donet's  
 8 memory proved, at best, unreliable. Mr. Donet testified under oath that he never saw graffiti  
 9 including the N-word in Tesla's bathrooms, under any spelling of the word, and that he never  
 10 saw a swastika. Nunley Decl., Ex. D (Donet Depo.) at 25:33–26:15. Plaintiff's counsel then  
 11 showed Mr. Donet an email chain (later marked as Trial Exhibit 109) containing a photo of  
 12 bathroom graffiti stating "all [N-words] must die" next to a swastika, and Mr. Donet's  
 13 subsequent statement that the graffiti was "found and cleaned up." Mr. Donet expressed  
 14 confusion, stated that "I don't recall this," but admitted that the graffiti was "pretty bad." *Id.* at  
 15 27:03–31:04. In addition to Mr. Donet's faulty memory, his contemplated testimony that he "did  
 16 not see the graffiti Mr. Diaz described and ... cleaned up any graffiti he learned about" also lacks  
 17 foundation and relevance, because Mr. Donet conceded at his deposition that a "janitorial  
 18 company," not himself, was responsible for cleaning up graffiti. *Id.* at 28:03–07.

19 The Court should also reject Tesla's wholly improper request to limit the evidence and  
 20 argument regarding Mr. Donet that was permitted in the first trial. *See* Mot. at 7 (requesting that  
 21 the Court preclude Plaintiff from introducing the interrogatory response that was read to the jury  
 22 at the first trial, which identified Mr. Donet as the employee responsible for graffiti clean-up, and  
 23 from pointing to Mr. Donet's absence from the trial). As the Court stated at the last status  
 24 conference, "the record is the record." 1/17/23 Tr. at 12:22. Tesla *chose* not to call Mr. Donet at  
 25 the first trial, likely because Tesla recognized that he lacked credibility. It now seeks to eat its  
 26 cake and have it too—avoid having Mr. Donet testify (since the Court is likely, based on its prior  
 27 order, to deny Tesla's motion) while preventing Mr. Diaz from commenting on Mr. Donet's  
 28 absence. Unless the Court wishes to allow *both* parties to expand the scope of evidence at the  
 second trial—and it is too late for that, given the resulting prejudice and need to conduct full

1 discovery of both sides' new witnesses—Tesla, like Plaintiff, must live with the consequences of  
 2 its prior choices.<sup>9</sup>

3 The Court's prior orders and applicable law prohibit Tesla from calling Mr. Donet to  
 4 testify at the retrial. If the Court creates an exception to its previous ruling and allows Mr. Donet  
 5 to testify as Tesla requests, Plaintiff should be permitted to introduce Trial Exhibit 109 to  
 6 impeach Mr. Donet. *See Nunley Decl., Ex. E* (Trial Ex. 109). That exhibit was excluded from the  
 7 first trial because it addressed an incident that occurred shortly after Mr. Diaz left Tesla, but it is  
 8 crucial and directly relevant impeachment evidence to show that Mr. Donet's testimony and  
 9 memory regarding racist graffiti at Tesla is untrustworthy.

10 Again, however, the Court has properly limited the damages retrial to the existing  
 11 witnesses and evidence, and Tesla has offered no reason to make a special exception for Mr.  
 12 Donet. Tesla's motion should be denied in its entirety.

13 **II. Opposition to Tesla's Motion in Limine No. 2 to Exclude Plaintiff's Standard-of-**  
**Care Expert Amy Oppenheimer**

14 Tesla's motion to exclude Amy Oppenheimer is plainly meritless. As with Tesla's motion  
 15 to admit Mr. Hurtado and Mr. Donet, it appears that the true purpose of Tesla's motion is to  
 16 obtain an order precluding Plaintiff's counsel from making the same arguments to the jury that  
 17 they successfully made at the first trial. That is contrary to the Court's order about the scope of  
 18 retrial. Tesla's motion should be denied.

19 Ms. Oppenheimer will testify at the retrial, as she testified at the first trial, about industry  
 20 standards for investigations and Tesla's failure to meet those standards and even to meet its own  
 21 standards. Tesla argues that this testimony should be excluded because "her testimony relates  
 22 exclusively to liability, not damages." Mot. at 7. Tesla does not state why that is, but simply  
 23 makes the conclusory assertion that her testimony has "no relevance to how Mr. Diaz was  
 24 harmed by such alleged conduct, including either his past or future emotional distress, or the  
 25 amount the jury should award as punitive damages in consideration of the degree of  
 26 reprehensibility of Tesla's conduct towards Mr. Diaz." *Id.*

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27  
 28  
<sup>9</sup> Again, if Plaintiff is precluded from pointing out Mr. Donet's absence, Tesla should be  
 similarly precluded with respect to Lamar Patterson.

1           Tesla’s unreasoned assertion is wrong. Ms. Oppenheimer’s testimony is directly relevant  
 2 to—and important evidence regarding—the amount of punitive damages that should be awarded  
 3 against Tesla. She testified that Tesla’s practices regarding investigating and preventing  
 4 workplace harassment did not meet the standard of care expected of employers. Tesla is right  
 5 that Ms. Oppenheimer’s testimony pertained in part to liability, but it pertains just as much to  
 6 punitive damages, and specifically to the reprehensibility of Tesla’s conduct. To state the  
 7 obvious, an employer that subjects its employees to harassment and fails to prevent harassment is  
 8 particularly blameworthy if, in doing so, it fails to even meet the basic industry standards for  
 9 preventing and investigating harassment. A company that fails to comply with industry practices  
 10 and its own policies also needs to be deterred from continuing to engage in conduct that falls as  
 11 far beneath the standard of care as Tesla’s did in this case. For these reasons, Tesla’s failure to  
 12 conduct a properly thorough investigation of Mr. Diaz’s complaints, in violation of industry  
 13 standards and its own purported standards, was a central takeaway of Ms. Oppenheimer’s  
 14 testimony and a core fact supporting the first jury’s punitive damages award and, specifically, the  
 15 amount awarded.

16           The relevance of Ms. Oppenheimer’s testimony is confirmed by the Court’s post-trial  
 17 ruling upholding (subject to remittitur) the first jury’s award of punitive damages. In analyzing  
 18 punitive damages, the Court used reasoning that mirrored Ms. Oppenheimer’s testimony.  
 19 *Compare Order on Post-Trial Motions* (Dkt. 328) at 39 (“[T]he jury could have found that the  
 20 companies’ responses to the written complaints were so inadequate as to imply indifference to  
 21 the serious problems of harassment in the workplace. … [H]aving a policy on paper and  
 22 effectively protecting employees from known racial harassment are different. And Tesla’s slaps  
 23 on the wrist—not to mention that it disciplined both Martinez *and* Diaz without viewing tape or  
 24 interviewing witnesses—undermine its assertions that it did enough.”) *with Nunley Decl. Ex. I*  
 25 (Trial Tr. Vol. 4) (testimony of Amy Oppenheimer) at 4:652:19-22 (“[T]he policies, you know,  
 26 don’t mean much if they are not enforced. In fact, sometimes it – it undermines and sends the  
 27 opposite message to have a policy that says one thing and then everybody doing something  
 28 else.”), 4:654:18-24 (“[T]here was no action taken other than I think some people being spoken  
 to about joking, a verbal warning, which wasn’t for racial harassment because they never made a

1 finding about that, which they should have. And that tends to trivialize the complaint, and then it  
 2 makes it harder for people to complain if that's going to be the response that they get."),  
 3 4:655:13-16 ("And there was surveillance, apparently, that could have been checked. ... [I]t's so  
 4 rare that you get the video and can really find out what happened. So to not check it when you  
 5 can makes no sense at all.").

6 Tesla's sole attempt at argument is its suggestion that Plaintiff failed to ask the Court to  
 7 give Jury Instruction 33 on retrial, the instruction that includes the sentence, "When an employer  
 8 becomes aware of potentially harassing conduct, it has a duty to promptly investigate and to take  
 9 immediate and effective corrective action should it determine that harassment has occurred."  
 10 Mot. at 7-8. That argument is factually incorrect and legally irrelevant. It is true that Plaintiff did  
 11 not include former Jury Instruction 33 when it lodged with the Court the initial drafts of its  
 12 proposed *new* instructions in connection with its January 10, 2023 status report. But Plaintiff did  
 13 include Jury Instruction 33 and many others in the complete set of proposed jury instructions for  
 14 the retrial, which Plaintiff shared with Tesla *before* submitting those instructions to the Court  
 15 and, more significantly, *before* Tesla filed its motion *in limine* making this factually inaccurate  
 16 argument. (Plaintiff filed that proposed instruction with the Court as scheduled. *See* Dkt. 389).

17 Jury Instruction 33 will be useful to the second jury because it will inform the jurors  
 18 about the basis for the first jury's liability findings, enabling the second jury to understand the  
 19 conduct for which it is assessing compensatory and punitive damages. In any event, whether or  
 20 not Jury Instruction 33 is given on retrial has no bearing on the relevance and probative value of  
 21 Ms. Oppenheimer's testimony to the punitive damages question on retrial.

22 Tesla also suggests that Ms. Oppenheimer should be excluded under Rule 403 because  
 23 her testimony "would confuse the issues, mislead the jury, waste time, and risk causing unfair  
 24 prejudice to Tesla from the jury's erroneous perception that Tesla's failure to offer its own expert  
 25 to respond to Ms. Oppenheimer's irrelevant testimony suggests a weakness in Tesla's damages  
 26 position." Tesla offers no reasoning for its position, and in particular does not address the clear  
 27 relevance and importance of Ms. Oppenheimer's testimony to punitive damages. Like its  
 28 relevance argument, Tesla's Rule 403 argument is conclusory and wrong.

In the alternative, Tesla requests that if Ms. Oppenheimer testifies, the Court should

1 “mitigate the prejudice to Tesla” by “preclud[ing] Mr. Diaz and his counsel from inviting the  
 2 jury to draw any negative inference based on Tesla’s inability to call a rebuttal expert.” Mot. at 8.  
 3 No law or logic supports Tesla’s request, which must be denied. The only “prejudice” to Tesla  
 4 resulted from its own prior counsel’s deliberate decision not to retain an expert of their own,  
 5 either affirmatively or for rebuttal, to demonstrate that its conduct was reasonable (assuming it  
 6 could find a credible expert to so testify). It is perfectly fair for Plaintiff to point out the  
 7 weakness in Tesla’s case, just as Tesla has pointed out its perceived weaknesses in Plaintiff’s  
 8 case. Tesla has not sought to admit a rebuttal expert on retrial and cannot do so now. *Little*, 2015  
 9 WL 798544, at \*2 (no manifest injustice in excluding new experts where “Defendant knew or  
 10 should have known that both of the proposed experts may have been necessary at the time of the  
 11 first trial”). In short, the fact that Tesla’s punitive damages case is unsupported by expert  
 12 testimony is not prejudice that the Court has the responsibility to “mitigate”—it is Tesla’s own  
 13 fault.

14 The motion *in limine* should be denied in its entirety.

15

16 **III. Opposition to Tesla’s Motion *in Limine* No. 3 to Admit Exhibits 229, 248, 252,**  
**and 254**

17 Tesla’s proposal to admit four exhibits on retrial that were not admitted at the first trial  
 18 should be denied because Tesla has not carried its burden of demonstrating that manifest  
 19 injustice would result from continuing to exclude them. As with its proposed new witnesses  
 20 Robert Hurtado and Andres Donet, Tesla was fully aware of these exhibits at the first trial and  
 21 made a strategic choice not to introduce them (and, in one case, lacked an evidentiary basis for  
 22 introducing the exhibit). Moreover, these exhibits are cumulative of exhibits already introduced  
 23 into evidence and have little or no relevance to compensatory or punitive damages.

24 Three of the exhibits Tesla proposes to introduce (Trial Exhibits 229, 248, and 252) relate  
 25 to Owen Diaz’s role as an elevator lead in assisting with discipline and notifying management of  
 26 issues with other employees. The fourth, Trial Exhibit 254, concerns Tesla’s firing of Rothaj  
 27 Foster, an employee who threatened Mr. Diaz but did not commit any racial harassment. What  
 28 all of these exhibits have in common is that (1) that they were on Tesla’s exhibit list for the first

1 trial; (2) they related to issues and theories that were disputed by the parties at the first trial; and  
 2 (3) Tesla nonetheless chose not to (or failed to) admit them at the first trial. These basic facts are  
 3 decisive and require the Court to deny Tesla's motion based on the principle, which should apply  
 4 equally to both sides, that if a party "knew or should have known that certain witnesses or  
 5 evidence was necessary at the time of the first trial, then the exclusion of those witnesses [or  
 6 evidence] during the retrial will likely not be manifestly unjust." *Little*, 2015 WL 798544, at \*2.

7 Tesla's attempt to carry its burden of demonstrating manifest injustice fails. Tesla's only  
 8 rationale for admitting exhibits 229, 248, and 252 is that they show that Mr. Diaz knew how to  
 9 contact his supervisors in writing. *See Mot.* at 9 ("All three exhibits show that Mr. Diaz had no  
 10 issue preparing and submitting written complaints on matters as trivial as a colleague's  
 11 tardiness."). That argument fails for multiple reason.

12 *First*, Tesla made this exact argument about Mr. Diaz at the first trial, so it could have  
 13 and should have introduced the exhibits then. *See, e.g.*, Nunley Decl. Ex. F (Trial Tr. Vol. 1)  
 14 (Tesla's Opening Statement) 1:58:7-10 ("These are the complaints that he made. These  
 15 complaints are all in writing. He's a very smart man. He's been around the block. At one point in  
 16 time, according to his resume, he actually ran his own franchise. He knows how things work.  
 17 The evidence is going to show that when he felt strongly about something, he had no problem  
 18 documenting it in writing to anyone who would listen.") Nunley Decl. Ex. K (Trial Tr. Vol. 6)  
 19 (Tesla's Closing Argument) 6:930:6-7 ("Every time he complained, he had the opportunity to  
 20 complain in writing. He didn't put anything in writing.").

21 *Second*, these exhibits are plainly cumulative and thus not necessary to make Tesla's  
 22 point, since two of Mr. Diaz's written complaints about harasser Ramon Martinez are already in  
 23 the trial record (Trial Exhibits 33, 235).

24 *Third*, these exhibits have no relevance, or at most only tangential relevance to damages.  
 25 The first jury already found that Mr. Diaz was harassed and that Tesla knew or should have  
 26 known about that harassment. E.g., Verdict Form Q. 3b; Jury Ins. No. 32. While Tesla may be  
 27 entitled at retrial to challenge Mr. Diaz's recollection of specific incidents, new evidence about  
 28 complaints he made as an elevator lead about routine workplace violations having nothing to  
 with racial harassment are not relevant to showing that any particular instance of racial

1 harassment did not occur. That Mr. Diaz made three written complaints about non-racist  
 2 incidents in addition to the two he made about racial harassment has no bearing on whether the  
 3 additional incidents of racial harassment he complained about orally actually occurred. As Tom  
 4 Kawasaki's testimony at the first trial illustrated, people frequently do not want to complain in  
 5 writing about the N-word. Nunley Decl. Ex. F (Trial Tr. Vol. 1) (testimony of Tom Kawasaki)  
 6 1:79:16-18 ("I just put 'racial in nature' because I'm not comfortable using those words that  
 7 were thrown."). While Mr. Diaz *could have* made written complaints, Erin Marconi's testimony  
 8 made clear that there was nothing improper or inadequate about making oral complaints instead.  
 9 Trial Exhibit 138 6:18-20. The *number* of written rather than oral complaints Mr. Diaz made has  
 10 nothing to do with the emotional distress he suffered from the racial harassment he  
 11 experienced—which the first jury already found Tesla knew or should have known about.

12 Tesla similarly fails to carry its burden with respect to Trial Exhibit 254, which contains  
 13 emails reflecting discipline of Rothaj Foster. Tesla's discipline of Foster was raised at the first  
 14 trial, and Tesla could and should have introduced this exhibit then. *See, e.g.*, Nunley Decl. Ex. K  
 15 (Trial Tr. Vol. 6) (Tesla's Closing Argument) 6:940:4-11 ("Let's go to the Rothaj Foster  
 16 incident, which is in November of 2015. ... It's a complaint by Mr. Diaz, absolutely. ... And if  
 17 Tesla is going to be held responsible, again, took responsibility, believed Mr. Diaz. And Mr.  
 18 Foster, who was investigated, Mr. Foster was walked off. Never saw Mr. Foster again."). For the  
 19 same reason, Trial Exhibit 254 is cumulative and redundant of evidence already admitted. *See,*  
 20 *e.g.*, Nunley Decl. Ex. H (Trial Tr. Vol. 3) 3:455:23-456:10 (Mr. Diaz's counsel questioning Mr.  
 21 Diaz about the incident where Mr. Foster threatened to shoot him).

22 It bears emphasis *none of these four documents concerns racial harassment*. Exhibits  
 23 229, 248, and 252 documents show, to a limited extent, how Mr. Diaz performed his role as a  
 24 lead with respect to minor problems in other employees' performance, but they show nothing  
 25 about how Mr. Diaz would have handled being personally subjected to traumatic racist abuse by  
 26 supervisors and co-workers. Similarly, Exhibit 254 shows how Tesla handled an incident of non-  
 27 racial threatening behavior directed at a supervisor, but this case is not about Tesla's overall HR  
 28 practices: it is about Tesla's specific indifference to racial harassment in its factory. *See, e.g.*,  
 Trial Exhibit 138 at 8:1-9:11 (discussing an incident where Tesla mandated sensitivity training

1 across all shifts after an employee drew breasts on a women’s restroom sign). Admitting these  
 2 irrelevant exhibits will confuse the jury about the relevant issues in violation of Rule 403, waste  
 3 the parties’ and the court’s time with multiple mini-trials about the circumstances of irrelevant  
 4 incidents, and provide no useful information to the jury about Mr. Diaz’s emotional distress or  
 5 Tesla’s reprehensible conduct.

6 Tesla also misrepresents the record in suggesting that any of these documents could be  
 7 admitted to impeach Mr. Diaz’s testimony. Tesla argues that Mr. Diaz’s emails would impeach  
 8 his testimony that he did not have access to Tom Kawasaki or Ed Romero’s email addresses. But  
 9 that mischaracterizes the record. Mr. Diaz testified only that at *some point* when he was being  
 10 harassed he did not have their email addresses, not that he never had them. *See* Nunley Decl. Ex.  
 11 H (Trial Tr. Vol. 3) 3:512:16-24 (“At that time I didn’t have access to their email. ... At some  
 12 point Mr. Romero gave me his email and told me I could write him and shoot an email to him.  
 13 And he had gave me, I think it was a paper with a few more email addresses on it.”). Tesla also  
 14 argues that Mr. Diaz’s emails could impeach his testimony that “he did not feel comfortable  
 15 documenting complaints for the more serious alleged misconduct of being called racial slurs.”  
 16 Mot. at 9. That theory of impeachment makes no sense: Mr. Diaz’s willingness to report more  
 17 minor issues in writing does not lessen the likelihood that he would be uncomfortable reporting  
 18 the use of the N-word in writing. Nunley Decl. Ex. H (Trial Tr. Vol. 3) (Testimony of Owen  
 19 Diaz) 3:452:19-20 (“I just didn’t put it in the email because, you know, like I said, in a  
 20 workplace, that word is not supposed to be used.”). Moreover, with respect to the specific  
 21 incident Tesla cites, Mr. Diaz explained that he thought the surveillance video would contain  
 22 audio and capture Ramon Martinez’s language for management to hear, so Mr. Diaz did not need  
 23 to report it. *Id.* at 3:520:25–521:1. In short, Tesla has identified no testimony by Mr. Diaz that its  
 24 proffered exhibits could be admitted to impeach.

25 Tesla could have introduced its four new exhibits in the first trial. It has offered no  
 26 justification for failing to do so, nor any reason (much less a showing of manifest injustice) for  
 27 the Court to create an exception to its evenhanded rule precluding any new exhibits from either  
 28 party. Tesla’s new exhibits are cumulative and irrelevant to damages, and their admission would  
 prejudice Mr. Diaz, who is properly limited to the exhibits he introduced at the first trial. Tesla’s

1 motion *in limine* should be denied.

2

3 **IV. Opposition to Tesla's Motion *in Limine* No. 4 to Exclude Evidence of Alleged**  
**Racist Conduct Not Directed at or Experienced by Mr. Diaz**

4

5 Tesla's final motion *in limine* asks that the court exclude "testimony in the damages trial  
 6 that concerns the supposed use of racially derogatory acts, words, or symbols toward other  
 7 workers that were not personally directed at or experienced by Mr. Diaz," on the ground that this  
 8 evidence is irrelevant to compensatory damages and "constitutionally barred" with respect to  
 9 punitive damages. Tesla also seeks to exclude certain of this evidence as hearsay, or on the basis  
 10 that this Court supposedly previously excluded it. None of Tesla's arguments has merit, and the  
 11 motion should be denied in its entirety.

12 In its ruling on the parties' motions *in limine* before the first trial, this Court placed sharp  
 13 restrictions on the scope of evidence that Plaintiff would be permitted to introduce regarding  
 14 events of racial harassment experienced by other Tesla employees. For example, the Court  
 15 entirely excluded the testimony of Tesla employees Melvin Berry, Nigel Jones, DeWitt Lambert,  
 16 Nathan Fraim, Titus McCaleb, and Jackel Williams, mostly on the ground that these employees  
 17 worked at Tesla during different time periods, in different parts of the factory, or with different  
 18 supervisors from Mr. Diaz. Dkt. 207 at 7-9. As a consequence, only a relatively small amount of  
 19 evidence pertaining to harassment of other employees was admitted, and that evidence was  
 20 limited to circumstances that were closely connected in various respects to Mr. Diaz's own  
 21 experience. *See, e.g., id.* at 6 (permitting evidence of Demetric Diaz's harassment, which Mr.  
 22 Diaz personally witnessed); *id.* at 7 (permitting evidence of Michael Wheeler's harassment,  
 23 given Wheeler's temporal overlap with Owen, their mutual acquaintance, and their mutual  
 24 contact with Ramon Martinez). Some of the evidence the Court allowed—such as the testimony  
 25 of Lamar Patterson, whose work overlapped with Mr. Diaz "in all respects," *id.* at 7—ultimately  
 26 did not come into evidence. Nonetheless, Tesla's motion seeks an additional massive exclusion  
 27 to the scope of evidence the second jury will hear, far beyond the Court's prior restrictions: Tesla  
 28 seeks to limit the testimony of Tom Kawasaki, Wayne Jackson, Ed Romero, Victor Quintero,  
 and Michael Wheeler. But Tesla's arguments go too far and would deprive Mr. Diaz of his right

1 to a fair trial. These witnesses' testimony is critical to enabling the jury to assess Mr. Diaz's  
 2 compensatory damages—including regarding the pervasiveness of racial harassment at Tesla at  
 3 the time Mr. Diaz was there, an issue Tesla intends to dispute—and it is also highly relevant to  
 4 Tesla's reprehensibility and the need for deterrence, and thus to punitive damages.

5 Tesla first argues, in a single paragraph, that “[a]ny emotional distress supposedly  
 6 suffered by workers other than Mr. Diaz at the Tesla Fremont factory based on acts, words, or  
 7 symbols that were not directed at Mr. Diaz lacks any causal connection to harm to Mr. Diaz, and  
 8 thus is irrelevant to Mr. Diaz's compensatory damages.” Mot. at 13. That breezy assertion is  
 9 wrong. For one, some of the evidence Tesla seeks to exclude is evidence of specific incidents of  
 10 racist abuse *of which Mr. Diaz was aware*. For example, Mr. Diaz himself testified about the  
 11 incident in which feces was placed on Michael Wheeler's golf cart. *See* 3:485:15-17. More  
 12 generally, as the Court recognized at the last status conference, the evidence Tesla seeks to  
 13 exclude provides persuasive corroboration of Mr. Diaz's testimony regarding the pervasiveness  
 14 of the hostile work environment at Tesla—and, in turn, the extent of Mr. Diaz's emotional  
 15 injuries. *See* 1/17/23 Tr. (the Court: “My memory of what Tesla was referring to as ‘Me Too’  
 16 evidence would go, I would think, to pervasiveness and punitive damages.”). *Tesla itself* has  
 17 recently told the Court that “Mr. Diaz's compensatory damages case turns entirely on the **extent,**  
 18 **degree and magnitude** of the alleged racial incidents. . . [t]he **severity or pervasiveness** of the  
 19 conduct is necessarily probative evidence from which a jury may infer the nature and degree of  
 20 emotional injury suffered.” Tesla's Renewed Motion for New Trial under *Gasoline Products*  
 21 (Dkt. 359) at 7 (emphasis Tesla's); *see also* F.R. Evid. 404(b). See also Fed. R. Evid. 404(b)  
 22 (“evidence of other acts are admissible to show opportunity, intent, knowledge, or absence of  
 23 mistake.”); *Obrey v. Johnson* (9th Cir. 2005) 400 F.3d 691, 694-699 (evidence that other  
 24 employees experienced racial discrimination in promotions admissible to show pattern and  
 25 practice of discrimination); *Heyne v. Caruso* (9th Cir. 1995) 69 Cal.3d 1475, 1479-1480  
 26 (testimony of other employees that employer harassed them admissible to support plaintiff's  
 27 claim of harassment, to wit as evidence of discriminatory motivation and intent, because it tends  
 28 to “demonstrate hostility towards a certain group,” and to show the employer's “general attitude  
 of disrespect” towards members of the plaintiff's protected class).

1       Based on the Court’s orders before the first trial, the only evidence that was admitted  
 2 about harassment not experienced by Mr. Diaz was evidence that the Court concluded bore a  
 3 sufficiently close resemblance—in time, place, and personnel—to Mr. Diaz’s own experience of  
 4 harassment. That evidence was relevant then and remains relevant now, because it supports Mr.  
 5 Diaz’s challenged testimony concerning the frequency, extent, and content of the racist epithets  
 6 and other acts of harassment comprising the hostile environment at Tesla to which he was  
 7 subjected. In other words, this evidence will properly assist the jury in assessing the scope of Mr.  
 8 Diaz’s emotional distress and awarding appropriate damages.

9       Beyond the issue of compensatory damages, *all* of the testimony that Tesla seeks to  
 10 exclude is relevant and important evidence to the jury’s award of punitive damages. Tesla  
 11 contends that evidence about conduct “not directed at or experienced by” Mr. Diaz is  
 12 “constitutionally barred from a calculation of punitive damages.” Mot. at 13. Tesla is wrong. The  
 13 case law that Tesla cites stands for the far more limited proposition that defendants cannot be  
 14 *punished for* injuries inflicted on non-parties. Those same cases clearly explain—in language  
 15 Tesla omits from its briefing—that there is a crucial difference between limiting *the purposes* for  
 16 which a jury may consider evidence of the widespread impacts of a defendant’s wrongful  
 17 conduct and precluding *any consideration* of that evidence. The Supreme Court has consistently  
 18 held that evidence of the impacts of defendants’ wrongful conduct on persons other than plaintiff  
 19 is admissible to demonstrate that a defendant’s misconduct is repeated or particularly dangerous.  
 20 The cases make clear that the way to distinguish between the proper and improper use of such  
 21 evidence is to provide a limiting instruction—which is exactly what the Court did at the first  
 22 trial—explaining that punitive damages may not be awarded to punish the defendant for injuries  
 23 suffered by persons other than the plaintiff.

24       The Supreme Court has long held that the “most important” factor in assessing whether a  
 25 particular award of punitive damages is consistent with the Due Process Clause is “the degree of  
 26 reprehensibility of the defendant’s conduct.” *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575  
 27 (1996). Two of the factors that bear on reprehensibility are whether “the tortious conduct evinced  
 28 an indifference to or a reckless disregard of the health or safety of others” and whether “the  
 conduct involved repeated actions or was an isolated incident.” *State Farm Mut. Auto. Ins. Co. v.*

1     *Campbell*, 538 U.S. 408, 419 (2003). Tesla’s motion acknowledges in passing that these two  
 2 factors demonstrate that evidence of conduct towards non-parties is relevant to punitive  
 3 damages. Mot. at 14. But it then goes on to assert the incorrect premise that such evidence is  
 4 absolutely prohibited by the Constitution, Mot. at 14-16.

5       Contrary to Tesla’s position, the Supreme Court has repeatedly made clear that a judge or  
 6 jury may permissibly consider evidence of conduct toward non-parties in assessing punitive  
 7 damages. In *Gore*, for example, the Court explained—in the context of a nationwide pattern of  
 8 practice by BMW—that “evidence that a defendant has repeatedly engaged in prohibited conduct  
 9 while knowing or suspecting that it was unlawful would provide relevant support for an  
 10 argument that strong medicine is required to cure the defendant’s disrespect for the law. Our  
 11 holdings that a recidivist may be punished more severely than a first offender recognize that  
 12 repeated misconduct is more reprehensible than an individual instance of malfeasance.” 517 U.S.  
 13 at 576–77 (citations omitted); *see also Campbell*, 538 U.S. at 419 (punitive damages may reflect  
 14 whether “the conduct involved repeated actions or was an isolated incident.”); *Pac. Mut. Life Ins.*  
 15 *Co. v. Haslip*, 499 U.S. 1, 21 (1991) (approving “the existence and frequency of similar past  
 16 conduct” as a factor in assessing punitive damages).<sup>10</sup>

17       The Court was even more explicit in *Philip Morris USA v. Williams*, 549 U.S. 346, 353  
 18 (2007), on which Tesla relies. There, the Court held that “the Constitution’s Due Process Clause  
 19 forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts  
 20 upon nonparties or those whom they directly represent.” *Id.* The Court was careful to explain,  
 21 however, that “*a plaintiff may show harm to others in order to demonstrate reprehensibility.*” *Id.*  
 22 at 355 (emphasis added). For example, “[e]vidence of actual harm to nonparties can help to show  
 23 that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general  
 24 public.” *Id.*; *see also Campbell*, 538 U.S. at 419 (punitive damages can reflect whether “the  
 25 tortious conduct evinced an indifference to or a reckless disregard of the health or safety of  
 26 others”). What a jury may *not* do is “go further than this and use a punitive damages verdict to  
 27 punish a defendant directly on account of harms it is alleged to have visited on nonparties.”

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28       <sup>10</sup> The Court in *Gore* went on to conclude on the facts of that case that BMW was not in fact a recidivist.

1 *Philip Morris*, 549 U.S. at 355. Given that this evidence may come in for one purpose but not  
 2 another, the Supreme Court suggested that the appropriate course is for courts to “provide  
 3 assurance that juries are not asking the wrong question, i.e., seeking, not simply to determine  
 4 reprehensibility, but also to punish for harm caused strangers.” *Id.* In performing this function,  
 5 courts have “some flexibility to determine what kind of procedures they will implement.” *Id.* at  
 6 357.

7 Even aside from the relevance of this testimony to the amount of punitive damages  
 8 necessary to “punish” Tesla is its relevance to the need to “deter” Tesla from engaging in the  
 9 wrongful conduct that resulted in the first jury’s Section 1981 liability findings. The Supreme  
 10 Court has repeatedly made clear that an award of punitive damages furthers two separate goals:  
 11 punishment (or retribution) and deterrence. *See, e.g., State Farm*, 538 U.S. at 416 (“punitive  
 12 damages … are aimed at deterrence and retribution”), citing *Cooper Industries, Inc. v.*  
*Leatherman Tool Group, Inc.*, 532 U. S. 424, 432, and *Pacific Mut. Life Ins. Co. v. Haslip*, 499  
 14 U. S. 1, 19 (1991). The jury cannot reasonably determine the extent to which Tesla’s conduct  
 15 needs to be deterred unless it is permitted to consider evidence demonstrating the full scope and  
 16 extent of its wrongful harassment of its Black employees at the Fremont factor—not just against  
 17 Owen Diaz but his co-workers as well. The jury can only determine what conduct to deter if it  
 18 knows what conduct occurred. To limit the jury’s consideration to the racial harassment  
 19 committed against Mr. Diaz only would deprive it jury of the information it needs to fairly  
 20 determine how much deterrence is needed. After all, there is no need to deter Tesla from  
 21 continuing to harm Mr. Diaz, who left Tesla years ago. Only if the jury is informed of the  
 22 widespread pervasive nature of the racial harassment that occurred throughout Mr. Diaz’s  
 23 employment can it fairly determine the amount of punitive damages that would be sufficient to  
 24 have the requisite deterrent effect.

25 The governing case law thus makes clear that, contrary to Tesla’s argument, evidence of  
 26 conduct not directed at Mr. Diaz—such as evidence about the pervasive use of the N-word, and  
 27 about evidence of other racial harassment at Tesla—is admissible for purposes of the jury’s  
 28 reprehensibility determination. Evidence demonstrating the pervasiveness of racial harassment  
 and racial epithets at Tesla goes both to the *repeated* nature of Tesla’s misconduct and to the

1 dangerousness of that misconduct—i.e., the fact that Tesla’s indifference towards the plight of  
 2 its Black employees created an environment in which not just Mr. Diaz, but *all* Black employees  
 3 at Tesla, were at risk of racist abuse. *See Philip Morris*, 549 U.S. at 357 (“[C]onduct that risks  
 4 harm to many is likely more reprehensible than conduct that risks harm to only a few.”). The  
 5 evidence Tesla seeks to exclude can properly be admitted for this purpose, as well as for the  
 6 other purposes discussed above and below, even while it is *not* admitted for the prohibited  
 7 purpose of encouraging the jury to punish Tesla directly for its conduct toward anyone other than  
 8 Mr. Diaz. *See id.* at 355.

9 With the exception of the incident regarding Michael Wheeler’s golf cart, Tesla does not  
 10 contend that the evidence it seeks to exclude is insufficiently similar to the conduct experienced  
 11 by Mr. Diaz. That is unsurprising, because the limited testimony the Court admitted at the first  
 12 trial relating to conduct experienced by other witnesses was exclusively evidence that was  
 13 similar in significant respects to the conduct Mr. Diaz testified about. *See also Campbell*, 538  
 14 U.S. at 423 (“[E]vidence of other acts need not be identical to have relevance in the calculation  
 15 of punitive damages”).

16 With respect to the feces placed on Mr. Wheeler’s golf cart, Tesla asserts without  
 17 explanation that the conduct “bears such little resemblance to the conduct Mr. Diaz complains of  
 18 that the jury may not consider that incident to assess the proper amount of punitive damages.”  
 19 Mot. at 15. Given Mr. Wheeler’s unimpeached and unrebutted testimony that he believed this  
 20 incident was racially motivated, Tesla fails to explain why this incident should be considered  
 21 dissimilar to the racial harassment Mr. Diaz faced. While the placement of feces may have been  
 22 particularly disgusting, the incident bears striking similarity to Mr. Diaz’s harassment in multiple  
 23 respects, including because it was another instance in which Tesla failed to adequately  
 24 investigate *or to consult available surveillance footage*—thus corroborating Mr. Diaz’s  
 25 complaint that Tesla turned a blind eye to race harassment even when videotaped confirmation of  
 26 the harassment was readily available. Nunley Decl. Ex. H (Trial Tr. Vol. 3) (Testimony of  
 27 Michael Wheeler) 3:432:22–434:12. In any event, Mr. Wheeler’s testimony should separately be  
 28 admitted both because it pertains to compensatory damages, *supra* at 18-19, and because Tesla’s  
 failure to investigate the incident was part of the evidence of Tesla’s indifference and reckless

1 disregard on which the first jury's liability verdict was based, *infra* at 23-24.

2 Tesla's cited cases provide no support for its position, and in fact support Plaintiff. Tesla  
 3 relies on *White v. Ford Motor Co.*, 500 F.3d 963, 972 (9th Cir. 2007), for the uncontroversial  
 4 proposition, established by *Philip Morris*, that juries cannot punish defendants for harm to non-  
 5 parties. In that case, the district court had refused to give an instruction that the jury could punish  
 6 the defendant only "for the harm to this plaintiff," and the Ninth Circuit reversed. *Id.* The Ninth  
 7 Circuit explained, however, that evidence of harm to non-parties *could* be admitted to  
 8 demonstrate the reprehensible nature of the defendant's conduct, *id.* at 972, and it held that the  
 9 issue could be resolved through use of a proper limiting instruction, as here. *Id.* at 973 ("On  
 10 remand, the district court must explain to the jury that although evidence of harm to nonparties  
 11 may bear on Ford's reprehensibility, any award of punitive damages cannot be used to punish  
 12 Ford directly for harms to non-parties.") (cleaned up).

13 Tesla's motion completely fails to acknowledge the possibility of a proper instruction—  
 14 much less the fact that this Court, in the first trial, already gave the instruction ordered by the  
 15 Ninth Circuit in *White*. See Jury Ins. No. 40 (Dkt. 280) ("In considering the amount of any  
 16 punitive damages, consider the degree of reprehensibility of the defendant's conduct, including  
 17 whether the conduct that harmed the plaintiff was particularly reprehensible because it also  
 18 caused actual harm or posed a substantial risk of harm to people who are not parties to this case.  
 19 You may not, however, set the amount of any punitive damages in order to punish the defendant  
 20 for harm to anyone other than the plaintiff in this case.").<sup>11</sup>

21 In addition to demonstrating that Tesla engaged in repeated and dangerous conduct, the  
 22 evidence of pervasive racial harassment in Mr. Diaz's workplace is *also* relevant to  
 23 reprehensibility analysis for a separate reason: it helps to establish the nature of the hostile work  
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25 <sup>11</sup> Tesla's other cited cases provide no greater support to its position. In *Dugan v. Nance*, 2013  
 26 WL 4479289, at \*1 (C.D. Cal. Aug. 20, 2013), the Court found that practical difficulties in the  
 27 case made a limiting instruction too difficult, but also concluded that "the proffered evidence  
 28 concerning defendant Nance is sufficiently dissimilar to the conduct at issue in this case that it is  
 not relevant on the issue of reprehensibility." *Grisham v. Philip Morris, Inc.*, 670 F. Supp. 2d  
 1014, 1036-37 (C.D. Cal. 2009), meanwhile, addressed a question of preclusion and rested its  
 decision on the risk of confusion for the jury on the facts of the case, as well as on the  
 redundancy of the evidence sought to be admitted through preclusion.

1 environment, Tesla's awareness of that environment, and its failure to take appropriate remedial  
 2 action—all of which is highly relevant to the amount of punitive damages that the second jury  
 3 should award. For example, the testimony of Ed Romero and Victor Quintero that Tesla seeks to  
 4 exclude demonstrates that management was fully aware of the pervasive use of the N-word at  
 5 Tesla's facility because multiple workers complained about its use—which goes to the  
 6 appropriate amount of punitive damages. Similarly, the testimony from Tom Kawasaki and  
 7 Wayne Jackson about the ubiquitous use of the N-word will corroborate Mr. Diaz's testimony  
 8 about the workplace atmosphere he experienced, in rebuttal of Tesla's likely strategy of  
 9 downplaying the extent of the N-word's use to minimize punitive damages. In short, Tesla's  
 10 motion improperly seeks to exclude evidence that is relevant, constitutionally permissible, and  
 11 crucially probative of the proper amount of punitive damages.

12 Beyond its general opposition to evidence of conduct directed at employees other than  
 13 Mr. Diaz, Tesla makes two arguments for the exclusion of specific evidence, neither of which  
 14 succeeds. First, Tesla suggests that Ed Romero and Victor Quintero's testimony regarding  
 15 reports they received of the N-word's use should be excluded as double or even triple hearsay.  
 16 That is incorrect, and it omits crucial context. For starters, none of Tesla's examples  
 17 demonstrates more than a single level of hearsay, because a declarant's use of the N-word is not  
 18 admitted for the truth of the matter asserted—it is a verbal act of harassment.<sup>12</sup> Regardless, the  
 19 only example Tesla references—Trial Exhibit 106, in which an N-word incident was reported to  
 20 Mr. Romero—comes within a hearsay exception, because it was admitted *solely to impeach* Mr.  
 21 Romero after he denied having received any complaints related to the N-word, and the Court  
 22 issued a proper limiting instruction. *See* Jury Ins. No. 5 (“I admitted Exhibit 106 for the limited  
 23 purpose of your consideration of the credibility of Edward Romero’s testimony … I want to  
 24 remind you that this case is about Mr. Diaz and the work environment that he experienced at the

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25  
 26  
 27 <sup>12</sup> To illustrate: Tesla argues, “For example, if Mr. Romero is asked whether Mr. Temores and  
 28 another employee said that Mr. Dennis said the n-word, Mr. Diaz must show that each hearsay  
 layer satisfies a hearsay exception or exclusion. None do, let alone all three.” Mot. at 16-17  
 (citation omitted). Tesla's example reflects only a single layer of hearsay, not two or three. Mr.  
 Romero's answer to the question will be hearsay, but Mr. Temores's statement is not hearsay  
 because Mr. Dennis's use of the N-word is not being offered for its truth.

1 Tesla factory, not what others in a different part of the factory experienced.”).

2 Second, Tesla contends the Court should exclude Wayne Jackson’s testimony regarding  
 3 his experience hearing the N-word throughout Tesla’s factory, on the basis that the Court’s initial  
 4 *in limine* rulings suggested that such testimony would be excluded unless Tesla opened the door.  
 5 See Mot. at 17. But Tesla raised this exact argument during trial, and the Court took the time to  
 6 review its *in limine* ruling after Mr. Jackson was asked about hearing the N-word. See Nunley  
 7 Decl. Ex. G (Trial Tr. Vol. 2) (Testimony of Wayne Jackson) 2:223:23–224:23. The Court  
 8 overruled the objection, concluding that the question was appropriate so long as it was limited to  
 9 the time Mr. Diaz worked at the factory. *Id.* That ruling was fully consistent with the Court’s  
 10 other rulings throughout the trial, and there is nothing improper about the Court clarifying the  
 11 application of its *in limine* rulings as the evidence comes in at trial. Furthermore, Mr. Jackson’s  
 12 testimony was relevant and probative: it corroborated Mr. Diaz’s testimony about the pervasive  
 13 use of the N-word at Tesla’s factory, a fact that was relevant to liability and is also relevant to  
 14 compensatory and punitive damages.

15 For these reasons, Tesla’s motion *in limine* should be denied.

16  
 17 Dated: February 10, 2023

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18  
 19  
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